JD(SF)–43–11
Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

BANNER HEALTH SYSTEM d/b/a
BANNER ESTRELLA MEDICAL CENTER

and Case 28-CA-23438

JAMES A. NAVARRO, An Individual

William Mabry, III, Esq., of Phoenix Arizona,
for the General Counsel.
Mark Kisicki, Esq. and Elizabeth Townsend, Esq.
(Steptoe & Johnson) of Phoenix, AZ, for the Respondent.

DECISION

Statement of the Case

Jay R. Pollack, Administrative Law Judge: I heard this case in trial at Phoenix, Arizona, on August 30-31. On April 7, 2011, James Navarro (Navarro) filed the charge alleging that Banner Health System d/b/a Banner Estrella Medical Center (Respondent or the Employer) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Regional Director for Region 28 of the National Labor Relations Board issued a complaint and notice of hearing on June 30, 2011, against Respondent alleging that Respondent violated Section 8(a) (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing. The complaint was amended on the second day of trial to add additional Section 8(a)(1) allegations.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the post hearing briefs of the parties, I make the following.

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Findings of Fact and Conclusions of Law

Jurisdiction

Respondent, an Arizona corporation, has been engaged in the operation of a hospital providing inpatient and outpatient medical care in Phoenix, Arizona. During the twelve months prior to the filing of the charge, Respondent received gross revenues in excess of $250,000. During the same period of time, Respondent purchased and received goods valued in excess of $5,000 which originated outside of California. During the same person of time, Respondent purchased and received goods valued in excess of $50,000 from outside the State of Arizona. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I. The Alleged Unfair Labor Practices

A. Background and Issues

Respondent operates a hospital located in Phoenix, Arizona, that provides inpatient and outpatient medical care. James Navarro has worked for Respondent as a sterile technician for about three years. The Central Processing Sterile Department (CPSD) employs 13 sterile processing technicians, operating 24 hours a day, seven days a week, and has three shifts.

Sterile processing technicians are responsible for the proper care and handling of all surgical instruments. These employees are also required to utilize equipment according to the manufacturer's recommendations and hospital policy and perform all functions according to established policies, procedures, regulatory and accreditation requirements, as well as applicable professional standards.

On Saturday, February 19, 2011, Navarro was working the day shift. Around 9 a.m. that morning, Navarro learned that there was a lack of hot water and steam pressure. Navarro spoke to an employee from Respondent's facilities department who advised him that the steam pipe needed to be fixed, that there would not be any hot water, steam pressure or heat.

Navarro then contacted house supervisor Cecilia Dicob and informed her of the steam pipe problem. Next, Navarro called Ken Fellenz, senior manager of the CPSD department. Navarro informed that he would not be able to sterilize the surgical instruments due to the broken steam pipe, that there were six operating surgeries scheduled for that day. He also informed Fellenz that there were labor and delivery instruments that were going to be used and that the surgery department had clean surgical instruments for surgeries that day.

Fellenz ordered Navarro to use the Sterrad machine to sterilize the labor and delivery instruments. The Sterrad machine is a low temperature sterilizer that uses hydrogen peroxide as the sterilant. The normal procedure is that the Autoclave, a large steam sterilizer is used for the labor and delivery instruments. The Autoclave could not be used that day because of the lack of steam. Navarro told Fellenz that he was unaware that the Sterrad machine could be used, as it was not the established procedure.

After speaking with Fellenz, Navarro began researching whether the Sterrad machine could be used to sterilize the labor and delivery instruments. Navarro found no documents supporting the use of the Sterrad machine. He then contacted Muriel Kremb, lead coordinator. Kremb told Navarro to use hot water from the coffee machine in the break room for the first step in the cleaning process of the labor and delivery instruments. Navarro stated that these

procedures were not established protocol and that somebody could get sick. Navarro did not clean or sterilize the labor and delivery instruments that day.

That day, employee Ruth Hernandez called Navarro to inform him that she might be late that day. Navarro told Hernandez that she might not have to come in because there was no steam. Hernandez called Kremb and was told to report to work. When Hernandez arrived at work, Navarro expressed his concern about the procedures suggested by Fellenz and Kremb. Navarro stated that he could not find documentation to support the procedure recommended by Fellenz and Kremb.

On February 20, when Navarro arrived at work he found that all the instruments had been cleaned. Navarro discussed with employee Curtis Wilks his concerns about using hot water from the coffee machine.

On February 20, Navarro spoke to house supervisor Dicob on two occasions. Navarro told Dicob that he wasn't trying to be insubordinate but that he did not feel comfortable using the methods directed by Fellenz and Kremb because it was not established procedure. Dicob answered that she was trying to find a solution to the steam pipe issue. After speaking with Dicob, Navarro spoke to nurse Mary Hedges. Navarro told Hedges of the procedures he was instructed to follow and asked Hedges if she had ever seen or heard anything about using the Sterrad machine or using hot water from the coffee machine. Hedges shared Navarro's concerns.

Around noon, Fellenz called Navarro and asked why Navarro had not used the Sterrad machine as instructed. Navarro stated that he was uncomfortable using that procedure. Fellenz stated that Navarro was refusing to follow instructions. Navarro stated that he was not refusing but was uncomfortable. Fellenz angrily stated that Navarro was not doing as instructed and that they would discuss the matter the following day.

On Monday, February 21, Navarro met with JoAnn Odell, human resources consultant. Navarro informed Odell that there had been no hot water available and that he was instructed by Fellenz and Kremb to use hot water from he coffee machine and the Sterrad machine. Navarro said that he was uncomfortable with this procedure and that he could find no documentation to support this procedure. Navarro expressed concern for his job.

On the morning of February 21, Fellenz wrote a memorandum concerning the weekend and his conversations with Navarro. Convinced that Navarro had been insubordinate Fellenz met with Joan McKisson , director of peri-operative services. Fellenz told McKisson that he wanted to put Navarro on corrective action for failing to sterilize instruments as instructed by Fellenz. Fellenz and McKisson met with Odell in her office. Odell advised against corrective action because there was no procedure in place to support cleaning and sterilization as suggested by Fellenz. The three agreed that Navarro would be given a non-disciplinary coaching instead.

Around 2 p.m, Navarro was called to McKisson's office. Mc Kisson informed Navarro that Fellenz had accused him of refusing to follow his instructions. Navarro insisted that he had finally followed instructions. Nonetheless, Navarro was given a coaching. The coaching document states "James refused to do as instructed by manager and lead tech which directly affected patient care.' On June 2, Respondent issued a memorandum stating that the coaching was removed and would not be part of Navarro's employment record.

On February 24, Fellenz called Navarro into his office and gave him a yearly performance evaluation.[2] The performance review consists of two sections: essential functions and behaviors. On the essential functions section, Navarro's grade was fully meets expectations. However, on the behaviors section, Navarro's rating was not fully meeting expectations. Navarro objected to the comments in the behavior section. Fellenz credibly testified that he had filled out the behaviors section based on complaints made to him by employees who worked with Navarro. Employees Hernandez and Louis Garcia both testified that they had complained to Fellenz on many occasions about Navarro.

Odell, Respondent's human resources consultant, spoke to Fellenz and told him that the evaluation was inconsistent since one half of the evaluation had Navarro not meeting expectations but on the overall evaluation fully meeting expectations. Fellenz indicated that he intended that Navarro overall met expectations. Fellenz then issued a revised annual performance evaluation. Fellenz revised four of the five categories in the behavior section. Fellenz then graded fully meets expectations in the behavior section and fully meets expectations in the overall rating.

During the hearing. General Counsel amended the complaint to allege that Respondent's confidentiality agreement and interview of complainant form violates Section 8(a)(1) of the Act.

The interview of complainant form is not given to employees. During interviews of employees making a complaint, Odell asks employees not to discuss the matter with their coworkers while the investigation is ongoing. I find that suggestion is for the purpose of protecting the integrity of the investigation. It is analogous to the sequestration rule so that employees give their own version of the facts and not what they heard another state. I find that Respondent has a legitimate business reason for making this suggestion. Accordingly, I find no violation.

Every employee hired by Respondent is required to sign a confidentiality agreement. The confidentially agreement states:

> I understand that I may hear, see and create information that is private and confidential. Examples of confidential information are;
> Patient information both medical and financial,
> Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee,
> Copyright computer programs, Business and strategic plans Contract terms, financial cost data and other internal documents.
> Keeping this kind of information private and confidential is so important that if I fail to do so, I understand that I could be subject to corrective action, including termination and possible legal action.

B. The Coaching and Evaluations

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Employees having no bargaining representative and no established procedure for presenting their grievances may take action to spotlight their

[2] The evaluation had been written prior to February 20.

complaint and obtain a remedy. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12–15 (1962). Accordingly, an employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities.

The Act protects employees who engage in individual action which is "engaged in with the objective of initiating or inducing group action." *Mushroom Transportation Co. v. NLRB*, 330 F.3d 683, 685 (3d Cir. 1964); *Owens-Corning Fiberglas Corp. v. NLRB,* 407 F.2d 1357, 1365 (4th Cir. 1969). Moreover, an employee need not first solicit other employees' views for his activity to be concerted. See *Whittaker Corp.*, 289 NLRB at 933-934 (employee was engaged in concerted activity where, not having had a chance to meet with any employee beforehand, he made a comment in protest as a spontaneous reaction to the employer's announcement that no annual wage increase would be forthcoming). See also *Enterprise Products*, 264 NLRB at 949-950; *Cibao Meat Products*, 338 NLRB at 934. In *Bell of* Sioux *City,* 333 NLRB 98, 105 (2001) the Board found protected concerted activity where an employee complained to fellow employee that she was treated unfairly. The Board found concerted activity as it involved a speaker and listeners. In addition, employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted. *El Gran Combo*, 284 NLRB 1115 (1987).

If the employer can show that the same action would have been taken against an employee in the absence of his or her protected activity, the employer rebuts the General Counsel's prima facie case. *Wright Line,*251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The clear evidence indicates that Fellenz was angry that Navarro had not followed his instructions to use the Sterrad machine to sterilize the surgical instruments. He spoke to Navarro and angrily asked why the employee had not followed his instructions. Navarro stated that he was not refusing to follow the instructions but he did not follow the instructions. The first thing the next morning, Fellenz wrote a memorandum reciting his belief that Navarro had been insubordinate. He spoke with his supervisor McKisson and then Odell the human resources consultant. It was decided to give Navarro a coaching. Accordingly, I find that Navarro was given the coaching not because of any protected concerted activity, but solely because Fellenz believed Navarro had engaged in insubordination.

I find that the performance review given to Navarro was not motivated by any protected concerted activity. First, the performance review was filled out prior to the concerted activity. Secondly, Fellenz credibly testified that he was influenced by complaints made by Navarro's coworkers. Two coworkers credibly testified that they had made numerous complaints to Fellenz concerning Navarro.

C. Independent violation of Section 8(a)(1)

Central to the protections provided by Section 7 of the Act is the employees' right to communicate to coworkers about their wages, hours and other terms and conditions of employment. An employer's rules prohibiting Section 7 activity are a violation of the Act, even if such rules have never been enforced. *Franklin Iron & Medal Corp.,*316 NLRB 819, 820 (1994).

In *NLS Group,* 355 NLRB No. 169 (2010) enfd. 65 F. 3d 475 (1st Cir. 2011) the Board stated that if a rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In the instant case Respondent's confidentiality

agreement provides that private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee is to be kept confidential. Further, keeping this kind of information private and confidential is so important that failure to do so, could subject an employee to corrective action, including termination and possible legal action.

In *Labinal, Inc.,*340 NLRB 203, 209-210 the employer argued there was no violation because the rule merely prohibited employees from finding out about another employee's personal pay information and precluded disclosure of that information absent the employee's knowledge or permission. The Board noted,

> To prohibit one employee from discussing another employee's pay without the knowledge and permission of that employee muzzles employees who seek to engage in concerted activity for mutual aid or protection. By requiring that one employee get permission of another employee to discuss the latter's wages, would, as a practical matter, deny the former the use of information innocently obtained which is the very information he or she needs to discuss the wages with fellow employees before taking the matter to management. *Id.*

In the instant case, Respondent's confidentiality agreement prohibits employees from discussing other employees' salaries or disciplinary actions, unless such information was originally disclosed by the original employee. As such it requires an employee to get permission from another employee to discuss the latter's wages and discipline, and could reasonably be construed to prohibit Section 7 activity. Thus under *Labinal, supra,* I find that the rule in Respondent's confidentiality agreement to violate Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by including in its confidentiality agreement a prohibition against sharing private employee information such as salaries and discipline.

3. Respondent did not otherwise violate the Act as alleged in the complaint.

4. The above unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[3]

ORDER

Respondent, Banner Health System d/b/a Banner Estrella Medical Center, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing the provision in is confidentiality agreement that contains the following language" Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee."

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Phoenix, Arizona, copies of the attached notice marked "Appendix."10 Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since November 7, 2010. In addition to physical posting of paper notices, notices shall be distributed electronically such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such manner.

(b) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, Washington, D.C. October 31, 2011

_____
Jay R. Pollack
Administrative Law Judge

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain or enforce the provision in our confidentiality agreement that contains the following language "Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Banner Health System d/b/a Banner Estrella Medical Center
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800

Phoenix, AZ 85004-3099

Hours: 8:30 a.m. to 5 p.m.

602-640-.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 510-637-3270.